

June 2009

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Recommended Citation

Daniel J. Pylman, *Res Ipsa Loquitur in the Restatement (Third) of Torts: Liability Based upon Naked Statistics Rather than Real Evidence*, 84 Chi.-Kent L. Rev. 907 (2010).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol84/iss3/15>

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RES IPSA LOQUITUR IN THE RESTATEMENT (THIRD) OF TORTS: LIABILITY BASED UPON NAKED STATISTICS RATHER THAN REAL EVIDENCE

DANIEL J. PYLMAN*

INTRODUCTION

Before a plaintiff can recover under traditional principles of negligence, she must prove a specific negligent act or omission by the defendant that caused actual harm to the plaintiff's person or property.¹ Courts do not *presume* negligence.² In the seminal case of *Byrne v. Boadle*, however, the English courts first took account of the fact that there may be instances where the plaintiff is unable to present any evidence of a specific negligent act or omission and yet where the injury to the plaintiff and the surrounding circumstances point to the reality that the defendant did in fact negligently cause the injury.³ In other words, on certain occasions *res ipsa loquitur* (the event "speaks for itself").⁴ In these situations, courts have determined that injured plaintiffs should not be without a remedy, but rather that the mere description of the event will serve as sufficient evidence of the defendant's causal negligence.⁵ Although courts have differed as to whether the doctrine creates a rebuttable presumption or merely allows the trier of fact to draw an inference of negligence, the very existence of the doctrine provides plaintiffs with an opportunity to recover without having to prove specific negligent conduct by the defendant.⁶

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1. DAN B. DOBBS, THE LAW OF TORTS § 154, at 370 (2000); W. PAGE KEETON et al, PROSSER AND KEETON ON TORTS § 39, at 242 (5th ed. 1984); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 42, at 199 (2d ed. 1955).

2. DOBBS, *supra* note 1, § 154, at 370.

3. *Byrne v. Boadle*, 159 Eng. Rep. 299, 300 (Exch. 1863).

4. *Id.*

5. DOBBS, *supra* note 1, § 154, at 370.

6. *Brown v. Poway Unified Sch. Dist.*, 843 P.2d 624, 627 (Cal. 1993) (holding that *res ipsa loquitur* creates a presumption of negligence); *Ybarra v. Spangard*, 154 P.2d 687, 688–89 (Cal. 1944); *Anderson v. Serv. Merch. Co., Inc.*, 485 N.W.2d 170, 176 (Neb. 1992) (stating that if the doctrine of *res ipsa loquitur* applies, "an inference of negligence exists for submission to the fact finders, which may accept or reject the inference in the factual determination whether the defendant is negligent."); *Mobil*

The doctrine of *res ipsa loquitur* has received overwhelming support in the American court system.⁷ Over the years, however, American courts have struggled to properly formulate the doctrine so as to achieve its important purpose of allowing recovery in appropriate situations while not formulating it so broadly as to enable recovery where there is no evidence that the defendant acted negligently.⁸ More specifically, courts have found it difficult to formulate the doctrine to allow recovery where an injury and its circumstances point to negligent causation by the defendant, while not expanding the doctrine so far as to enable plaintiffs to recover when the circumstances of the particular accident fail to indicate in any way that (1) negligent conduct was the cause of the plaintiff's injury and (2) the negligent causal conduct was that of the defendant.⁹ Indeed, some articulations of *res ipsa loquitur* transform the doctrine into a mere statistical probability test, so that if the doctrine were applied literally, plaintiffs could raise a *prima facie* case of negligent causation by the defendant based upon naked statistical data alone rather than upon any concrete evidence of negligent conduct by anyone, much less by the defendant, in the particular situation.¹⁰ The drafters of these formulations have at times lost sight of the fact that, when applying *res ipsa*, there must be some substantive reason for holding a particular defendant liable.¹¹ Conversely, other formulations of the doctrine are overly strict, thereby undercutting the policy reasons for which the doctrine exists and disabling plaintiffs from recovering where a legitimate claim exists.¹²

The various formulations of the *res ipsa loquitur* doctrine found in the case law as well as in the *Restatement (Second) of Torts* (hereafter *Res-*

Chem. Co. v. Bell, 517 S.W.2d 245, 251 (Tex. 1974) (stating that the effect of *res ipsa loquitur* is that the jury may infer negligence, but that no presumption of negligence arises); Owen v. Brown, 447 S.W.2d 883, 886 (Tex. 1969).

7. KEETON, *supra* note 1, § 39, at 244 (claiming that all state courts have explicitly accepted and applied the doctrine of *res ipsa loquitur* except for South Carolina, which has rejected it by name but applied it in effect). *See, e.g.*, Culp v. Wal-Mart Stores, Inc., 1998 U.S. App. LEXIS 846, 4–5 (4th Cir. 1998) (stating that South Carolina has unequivocally rejected the doctrine of *res ipsa loquitur*). *But see* Debusscher v. Sam's East, Inc., 505 F.3d 475, 480–81 (6th Cir. 2007) (indicating that Michigan courts have been reluctant to accept the *res ipsa loquitur* doctrine explicitly, though they have implicitly and effectively adopted a form of the doctrine).

8. *See, e.g.*, KEETON, *supra* note 1, § 39, at 243–44; Foster v. City of Keyser, 501 S.E.2d 165, 179–83 (W. Va. 1997); Gilbert v. Korvette, Inc., 327 A.2d 94, 96–99 (Pa. 1974).

9. DOBBS, *supra* note 1, § 154, at 371.

10. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 17 (Proposed Final Draft No. 1, 2005) [hereafter RESTATEMENT THIRD].

11. *Id.* at cmts. b & d (suggesting that a mere statistical probability that the defendant negligently caused the injury, without any case-specific evidence that this is true, would be sufficient to raise a *prima facie* case under the doctrine of *res ipsa loquitur*).

12. *See, e.g.*, Debusscher, 505 F.3d at 480–81 (listing several limiting instructions accompanying the core role of *res ipsa loquitur* that undercut the efficacy and purpose of the doctrine).

tatement Second) and the *Restatement (Third) of Torts* (hereafter *Restatement Third*) illustrate the difficulty of formulating the doctrine appropriately.¹³ In this note, I argue that the *Restatement Second* successfully balanced the policy concerns underlying *res ipsa loquitur* with the real-life consideration that a plaintiff, although she may have suffered serious injuries, ought not be able to invoke the doctrine unless she has sufficiently implicated the relevant defendant as the party responsible for her injuries.¹⁴ I then take a critical look at the *Restatement Third* which has transformed the doctrine of *res ipsa* into a pure statistical probability test by eliminating portions of the doctrine that served as necessary safeguards for preventing liability where there is no particularistic evidence linking the defendant to the injury.¹⁵

In Part I of this note, I discuss the development of *res ipsa loquitur*. More particularly, I examine the changes in the doctrine that have increasingly allowed for recovery based upon abstract probabilistic data and the implications of these changes for the common assertion that allowing recovery under *res ipsa* can simply be equated with proving negligence via circumstantial evidence.¹⁶ In Part II, I discuss whether abstract statistics should be sufficient to satisfy the requirements of *res ipsa loquitur*.¹⁷ Part III will consist of an argument for the formulation of *res ipsa* found in the *Restatement Second*.¹⁸ Finally, in Part IV, I critically examine the formulation of *res ipsa loquitur* found in the *Restatement Third* and the rationale for the changes made from the *Restatement Second*.¹⁹ I explain why those changes are misguided, unhelpful, and, if literally applied, will lead to the liability of defendants who have not negligently caused an injury while also preventing the liability of defendants who have.

13. RESTATEMENT (SECOND) OF TORTS § 328D (1965) [hereafter RESTATEMENT SECOND]; RESTATEMENT THIRD § 17.

14. *Infra* at Part III (arguing that the *Restatement Second* offers the best formulation of *res ipsa loquitur* insofar as it serves the purpose for which the doctrine of *res ipsa loquitur* exists—namely, serving injured plaintiffs who, due to the nature of the injury-causing accident, are unable to offer specific evidence of negligent causation by the defendant—while also requiring the plaintiff to present some case-specific evidence, direct or circumstantial, indicating she has identified the defendant responsible for her injuries).

15. *Infra* at Part IV (arguing that the drafters of the doctrine of *res ipsa loquitur* in the *Restatement Third* have transformed the doctrine into one that, if literally applied, can be satisfied with purely statistical data).

16. *Infra* at Part I (tracing the changes in the doctrine of *res ipsa loquitur* that have opened the door to the possibility of recovery through presentation of statistical data).

17. *Infra* at Part II (discussing the assumptions that have resulted in the conclusion that plaintiffs should be able to recover, in certain situations and under certain theories, based upon statistical data rather than case-specific evidence).

18. *Infra* at Part III.

19. *Infra* at Part IV.

I. FROM CONCRETE EVIDENCE TO ABSTRACT STATISTICS

It has often been said that “*res ipsa loquitur*” is merely a fanciful name for ordinary proof of negligence through circumstantial evidence.²⁰ Prosser, in his *Handbook of the Law of Torts*, referred to *res ipsa loquitur* as “one type of circumstantial evidence” and wrote that the doctrine consists of “nothing more than a reasonable conclusion, from the circumstances of an unusual accident, that it was probably the defendant’s fault.”²¹ This understanding of *res ipsa loquitur* may appear correct given the way the doctrine was applied in its earliest cases, such as *Byrne v. Boadle*.²² There, the plaintiff was a pedestrian passing by the defendant’s warehouse when a barrel of flour rolled out of an overhead window and landed on the plaintiff, causing him serious injuries.²³ The only evidence adduced by the plaintiff at trial was the testimony of a passing witness who saw nothing but the barrel strike the plaintiff and knock him into an adjoining shop; the plaintiff himself had no recollection of what had taken place.²⁴ Despite the plaintiff’s inability to offer “a scintilla of evidence” of any specific negligent act or omission by the defendant or its employees, the court held that the injury and its immediately surrounding circumstances established a prima facie case of negligence against the defendant.²⁵ This was true because, as Baron Pollack famously noted, a “barrel could not roll out of a warehouse without some negligence.”²⁶

Looking at the facts of *Byrne v. Boadle*, one may be tempted to agree with those who label *res ipsa loquitur* as merely a fancy-sounding name for ordinary proof of negligence and causation through circumstantial evidence. After all, as Baron Pollack stated, this type of injury would not occur without negligence by someone, and the only plausible sources of such causal negligence in that case were persons under the control of the defendant. Yet the case law suggests that courts have applied *res ipsa loquitur* in various cases that would be described as anything but ordinary circumstan-

20. DOBBS, *supra* note 1, § 154, at 372; KEETON, *supra* note 1, § 39, at 242–43; Aguirre v. Turner Constr. Co., 501 F.3d 825, 831 (7th Cir. 2007); Debusscher v. Sam’s East, Inc., 505 F.3d 475, 480 (6th Cir. 2007); Estate of Zimmerman v. SEPTA, 17 F. Supp. 2d 372, 379 (E.D. Pa. 1998); Seeley v. Combs, 416 P.2d 810, 813 (Cal. 1966); Haas v. United States, 492 F. Supp. 755, 761 (Mass. 1980).

21. PROSSER, *supra* note 1, § 42, at 201.

22. *Byrne*, 159 Eng. Rep. at 301. Appearances can be deceiving, however. As I will discuss *infra*, Prosser’s formulation of *res ipsa loquitur* is not the same doctrine that the Baron Pollock applied in *Byrne*. *Id.*; see *infra* at notes 28 & accompanying text, 39–40 & accompanying text.

23. *Byrne*, 159 Eng. Rep. at 299.

24. *Id.*

25. *Id.* at 300–01.

26. *Id.* at 301.

tial evidence cases.²⁷ Indeed, even in *Byrne v. Boadle* the inference of negligent conduct was not based upon the traditional understanding of circumstantial evidence.²⁸

A. Res Ipsa ≠ Circumstantial Evidence

In ordinary, non-*res ipsa* cases, evidence, whether circumstantial or direct, must point to the *specifics* of the defendant's conduct.²⁹ For example, evidence such as a defendant's running from a dead body, the victim's blood on the defendant's clothing, and the defendant's possession of the type of weapon that was involved in the crime all serve as circumstantial evidence that the defendant murdered the victim with that weapon.³⁰ Similarly, in a negligence action, long skid marks left on the road by the defendant's vehicle serve as circumstantial evidence that the defendant was traveling at a high rate of speed.³¹ In these cases, in the absence of or in addition to direct evidence, the plaintiff utilizes circumstantial evidence to prove that the defendant engaged in *particular, specific* acts.³²

Conversely, in many cases involving the application of *res ipsa loquitur*, the jury is permitted to infer negligent conduct by a defendant without *any* evidence, direct or circumstantial, regarding the defendant's specific conduct on the particular occasion.³³ Again consider *Byrne v. Boadle*.³⁴

27. See, e.g., *McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774, 776–79 (5th Cir. 1988) (applying *res ipsa loquitur* where a grenade exploded despite plaintiff's inability to offer any evidence of a *specific* negligent act or omission by the defendants); *Fowler v. Seaton*, 394 P.2d 697, 698–700 (Cal. 1964) (applying *res ipsa loquitur* where a three year old child suffered a serious brain injury at day care but where the parents were unable to present *any specific evidence* of causal negligence by the defendant); *Anderson v. Serv. Merch. Co., Inc.*, 485 N.W.2d 170, 172–73 (Neb. 1992) (applying *res ipsa loquitur* where a light fixture fell from the ceiling injuring the plaintiff despite the plaintiff's inability to offer any specific evidence of a negligent act or omission by the defendant).

28. *Byrne*, 159 Eng. Rep. at 300 (no circumstantial evidence, as one would traditionally define it, was offered by the plaintiff to prove specific acts or omissions on the part of the defendant that amounted to negligent conduct).

29. DOBBS, *supra* note 1, § 154, at 372.

30. These pieces of evidence would each be properly considered "circumstantial evidence" insofar as each one of them, if taken as true, would still require an inference to be drawn in order to resolve the ultimate issue. See MCCORMICK ON EVIDENCE § 185, at 308 (Kenneth S. Broun ed., 6th ed. 2006); see also STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE: LAW AND PRACTICE § 1.06, at 6 (2d ed. 2004).

31. KEETON, *supra* note 1, § 39, at 242.

32. DOBBS, *supra* note 1, § 154, at 372; FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 19.3, at 7 (2d ed. 1986) [hereafter HARPER, JAMES & GRAY].

33. See 59 A.L.R. 468 (1929).

[I]n the situation to which *res ipsa loquitur* as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate—which rests on common experience and not on the specific circumstances of the instant case—that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence; that is, in the absence of a breach of duty such as defendant owed to plaintiff.

There, the court allowed the plaintiff to recover despite the fact that absolutely no evidence was offered concerning the specifics of the defendant's conduct.³⁵ For example, the plaintiff offered no evidence to indicate that the defendant had stored the flour barrel inappropriately, that he was moving it in an unsafe manner, that certain safety mechanisms were not in place, or any other allegation that might indicate specific negligent conduct by the defendant.³⁶ Yet, due to the injury and the surrounding circumstances, the court stated that the defendant must have been negligent (in some unknown and unspecifiable manner).³⁷ Here, then, is a dramatic distinction between cases involving the application of the *res ipsa loquitur* doctrine and ordinary circumstantial evidence cases: with *res ipsa*, the plaintiff no longer need satisfy the traditional requirement of proving the defendant's specific conduct.³⁸

There is yet another fundamental distinction between ordinary circumstantial evidence cases and those involving the application of *res ipsa loquitur*, however—one that often goes unnoticed. Over the years, the notion has developed that the doctrine of *res ipsa loquitur* can be applied not only in cases like *Byrne v. Boadle* where the particular accident at issue “could not” or “would not” have occurred unless there was negligence³⁹ (thereby making causally negligent conduct on the particular occasion a prerequisite to recovery), but also in cases where the type of accident at issue *ordinarily* could not, would not, or does not occur unless there is negligence, thereby creating the possibility of recovery when no negligent conduct occurred whatsoever on the particular occasion.⁴⁰

Id.

34. *Byrne*, 159 Eng. Rep. 299.

35. The court said that not even a “scintilla” of evidence had been proffered. *Id.* at 300.

36. *Id.*

37. *Id.* at 301.

38. DOBBS, *supra* note 1, § 154, at 372.

39. It has been observed that the phrasing of subsection (a) is ambiguous. David Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456, 1461–64 (1979). However, while Kaye argues that the ambiguity lies with the phrase “ordinarily does not occur,” Richard W. Wright has pointed out that the real ambiguity lies in the meaning of the phrase “in the absence of.” See *id.*; Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1336 n.144 [hereafter *Possible Wrongs*]. As Wright correctly discerns, if “in the absence of negligence” is interpreted as meaning “if there is no negligence,” then condition (a) simply means that accidents of this type do not usually occur when there is no negligence. *Id.* The fact that an accident usually does not occur when there is no negligence, however, does not permit the inference that an accident is usually due to negligence when it does occur. The phrase “in the absence of negligence” in the Restatement Second, therefore, should be replaced with “unless there is negligence.”

Id.

40. RESTATEMENT SECOND, *supra* note 13, § 328D.

Allowing an inference of negligence when an accident does not *ordinarily* occur in the absence of negligence implies the conclusion that an abstract probability—a non-case-specific *ex ante* probability indicating that negligence causes a particular injury more than fifty percent of the time—would, by itself, constitute sufficient “evidence” to raise a *prima facie* case of negligent causation in a particular situation under *res ipsa*. Herein lies the problem, however: such abstract probabilistic information, which is completely detached from and in no way based upon the specific facts of the case, cannot qualify as “circumstantial evidence” in the traditional sense of the phrase.⁴¹ An example will illustrate the point.⁴² Assume that a defendant fails to stop at a stop sign fifty-five percent of the time and comes to a complete stop the other forty-five percent of the time. On one particular day, the defendant is involved in an accident with another vehicle at that very intersection. Does the abstract probability that the defendant fails to stop at the stop sign fifty-five percent of the time help us determine whether the defendant *actually* failed to stop *on this particular* occasion and, thus, acted negligently?

The point of the hypothetical is to illustrate that abstract probabilities about aggregated events tell us *nothing* about what *actually* has taken place on any particular occasion.⁴³ Circumstantial evidence, on the other hand, is traditionally thought of as evidence which, although not direct, is still concrete information about particular facts specific to the case at hand.⁴⁴ Again, an example is long skid mark left on the road by the defendant’s vehicle on the particular occasion as circumstantial evidence that the defendant was traveling at a high rate of speed.⁴⁵ Circumstantial evidence, unlike abstract probabilities, has probative value for determining what *actually* occurred.⁴⁶

41. See, e.g., HARPER, JAMES & GRAY, *supra* note 32, § 19.5, at 7–8 (discussing circumstantial evidence and assuming it to be particularistic in nature, not mere statistical data); *United States v. Veysey*, 334 F.3d 600, 605 (7th Cir. 2003).

42. This example is borrowed from Richard W. Wright, Tort Law: Basic Principles of Liability, Chapter 5, § B.3, at 367–68 (December 31, 2008) (unpublished manuscript, on file with the author at Illinois Institute of Technology, Chicago-Kent College of Law) [hereafter *Basic Principles*].

43. Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1050–52 (1988) [hereafter *Bramble Bush*]. See also *United States v. Veysey*, 334 F.3d 600, 605 (7th Cir. 2003); *Howard v. Wal-Mart Stores*, 160 F.3d 358, 359–60 (7th Cir. 1998); *Baker v. Bridgestone/Firestone Co.*, 966 F. Supp. 874, 875–76 (W.D. Mo. 1996); *Sargent v. Mass. Accident Co.*, 29 N.E.2d 825, 827 (Mass. 1940); *Day v. Boston & Maine R.R.*, 52 A. 771, 774 (Me. 1902).

44. See, e.g., MCCORMICK ON EVIDENCE, *supra* note 30, § 185, at 308; FRIEDLAND, *supra* note 30, § 1.06, at 6.

45. KEETON, *supra* note 1, § 39, at 242.

46. MCCORMICK ON EVIDENCE, *supra* note 30, § 185, at 308–09; Wright, *Bramble Bush*, *supra* note 44, at 1050–52.

B. *The Source of the Confusion*

If this is the case, however, and such a large distinction exists between abstract probabilities and circumstantial evidence, why do commentators assume that, by demonstrating that something does not “ordinarily occur in the absence of negligence,” a plaintiff has raised a *prima facie* case of negligence *through circumstantial evidence*?⁴⁷ The answer lies in the fact that some commentators seem to have assumed that because all evidence, whether direct or circumstantial, is never 100 percent conclusive but rather “probabilistic” in terms of establishing any particular ultimate fact, it follows that *any* sort of probability can satisfy the evidentiary standard in a tort action, namely, proof by a preponderance of the evidence.⁴⁸

There are two substantial problems with this line of reasoning. First, such reasoning wrongly assumes that *all* probabilities—whether abstract probabilities or probabilities based on direct or circumstantial evidence specific to the particular occasion—are equivalent and equally relevant for resolving the question of liability.⁴⁹ Therefore, so the logic presumably goes, just as the trier of fact can make a determination of liability based solely upon circumstantial evidence, so too can the trier of fact make a determination of liability based solely upon abstract probabilities.

The second problem with such reasoning is that it requires that the preponderance of the evidence standard in a tort action be reduced to a mere statistical probability.⁵⁰ Both of these assumptions will be discussed at length in Part II. For now, however, it is sufficient to recognize that an abstract probability does *not* serve the same function as circumstantial evidence, which is case-specific.

Despite the problems that accompany equating abstract probabilities with circumstantial evidence, many courts, as we have noted, have (perhaps

47. See, e.g., PROSSER, *supra* note 1, § 42, at 200; RESTATEMENT SECOND, *supra* note 13, § 328D cmt. b. But see RESTATEMENT THIRD, *supra* note 10, § 17 cmt. a (referring to *res ipsa loquitur* as “circumstantial evidence of a quite distinctive form.”).

48. See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 21.2, at 520–21 (1986) (arguing that allowing plaintiffs to win by producing only abstract evidence would be wrong, not because abstract probabilities tell us nothing about what actually occurred, but because to allow plaintiffs to do so would result in the perverse incentive for plaintiffs to seek out only abstract probabilities that suggest that a particular defendant probably negligently caused the plaintiff’s injury and no additional, particularistic evidence); *Howard v. Wal-Mart Stores, Inc.*, 160 F.3d 358, 360 (7th Cir. 1998) (stating that “all evidence is probabilistic in the sense of lacking absolute certainty” and arguing that courts have rejected abstract statistics in ordinary negligence (non-*res ipsa*) cases, not because they are unable to prove that a defendant’s negligence actually caused a plaintiff’s injury, but rather because the inability of a plaintiff to offer anything more than abstract statistics suggests that the plaintiff has been lazy in pursuing evidence in support of her case or, alternatively, has secretly found evidence which defeats her case).

49. RESTATEMENT SECOND, *supra* note 13, § 328D cmts. b & c.

50. Wright, *Possible Wrongs*, *supra* note 39, at 1311–17.

inadvertently) incorporated this logic into their formulations of the doctrine of *res ipsa loquitur*, thereby theoretically allowing plaintiffs to satisfy the “preponderance of the evidence” standard for proof of negligent causation by relying on abstract probabilities.⁵¹ *Graham v. Badger*,⁵² an opinion authored by Oliver Wendell Holmes, Jr., was one of the earliest opinions to articulate the doctrine of *res ipsa loquitur* in this way. Holmes therein defined *res ipsa* as

merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind *commonly* does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believes, that it happened in consequence of negligence in this case.⁵³

As has been pointed out, in the now commonly accepted formulation of the doctrine, the word “commonly” is replaced with “ordinarily”: the trier of fact must conclude that the injury is of such a nature that it “*ordinarily* would not occur in the absence of negligence by the defendant.”⁵⁴ And although the terms “ordinarily” or “commonly” could be interpreted as “generally” or “almost all the time,” they instead are usually interpreted as merely requiring a commonsense, unquantified probability that the defendant was negligent.⁵⁵

51. HARPER, JAMES & GRAY, *supra* note 32, § 19.6, at 32–37 & accompanying notes. This is true whenever a court allows a jury to conclude that the injury is one that ordinarily does not occur in the absence of negligence based solely upon a “gut instinct” or the generalized notion of “common experience,” rather than upon case-specific evidence. *See, e.g.*, RESTATEMENT SECOND, *supra* note 13, § 328D cmt. d.

52. 41 N.E. 61 (Mass. 1895).

53. *Id.* at 61 (emphasis added). Holmes may not have been equating abstract probabilities with circumstantial evidence; rather, he may have merely viewed *res ipsa* as a “second best” liability doctrine. Nonetheless, by phrasing *res ipsa* in this way, he at least opened the door to allowing plaintiffs to satisfy the evidentiary standard by way of mere probabilities.

54. *See e.g.*, *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 438 (Cal. 1944).

55. *See, e.g.*, RESTATEMENT SECOND, *supra* note 13, § 328D cmt. e (Recovery under *res ipsa loquitur* is permissible when “[i]t is enough that the facts proved reasonably permit the conclusion that negligence is the *more probable* explanation.”) (emphasis added); *Hartnett v. O’Rourke*, 69 Fed. Appx. 971, 979–80 (10th Cir. 2003) (holding that the requirement that an injury would not ordinarily occur in the absence of negligence requires a balancing of probabilities to see what most likely caused an injury); *Pacella v. Resorts Casino Hotel*, 2007 U.S. Dist. LEXIS 72941, 13–14 (E.D.N.Y. 2007) (stating that in order to “invoke the *res ipsa* doctrine, a plaintiff need not eliminate all other explanations for the accident, but rather must merely show ‘that it is *more probable than not* that the defendant’s negligence was a proximate cause of the mishap.’”) (emphasis added); *Triche v. Overnite Transp. Co.*, 1996 U.S. Dist. LEXIS 7233, at 13 (E.D. La. 1996) (quoting *Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1362 (La. 1992)); *Holmes v. Gamble*, 644 P.2d 405, 408–09 (Col. 1982); *see also supra* note 51.

II. SHOULD ABSTRACT STATISTICS BE ALLOWED WITH *RES IPSA*?

Thus far, we have noted that proof of negligence through abstract probabilities cannot be equated with proof of negligence through case-specific, circumstantial evidence.⁵⁶ We have also recognized (and tacitly criticized) that, by phrasing the doctrine of *res ipsa loquitur* as requiring proof that the type of accident or injury that occurred does not “ordinarily occur in the absence of negligence,” courts have allowed the possibility of recovery based upon abstract probabilities despite the inability of such abstract statistics to indicate *anything* about what actually occurred on a given occasion.⁵⁷ But why this criticism? Despite the gap in relevance between abstract probabilities and case-specific circumstantial evidence, one might ask why abstract probabilities should *not* be allowed to satisfy the plaintiff’s burden of proof in a *res ipsa* case. After all, in many cases involving application of *res ipsa*, no direct or circumstantial evidence exists with which a plaintiff can prove a defendant’s specific negligence; *this is the reason why the doctrine exists in the first place*.⁵⁸ Therefore, one might argue that in many *res ipsa* cases, including the very first, *Byrne v. Boadle*,⁵⁹ abstract probabilities might be the best that an injured plaintiff can be expected to offer. Should not courts allow what abstract statistics indicate *probably* occurred to be sufficient to allow the trier of fact to draw an inference of causal negligence? Or even to allow such statistics to create a rebuttable presumption of causal negligence?

Such questions recognize that abstract probabilities do not serve the same function as case-specific circumstantial evidence, but imply that, because of the unfortunate position of plaintiffs who are forced to resort to *res ipsa* because of a lack of case-specific evidence, the court should apply a looser evidentiary standard and allow abstract probabilities to carry the day on the issues of negligence and causation. I believe that this argument is a good one and one that will ultimately vindicate allowing recovery in *res ipsa* cases based upon abstract probabilities. However, there are two ways of justifying this result, only one of which is correct. First, one can reach this result by reasoning that an abstract probability—indicating that accidents like the one that occurred generally occur because a person in the position of the defendant acted negligently—justifies a straightforward

56. See *supra* Part I.

57. *Id.*

58. HARPER, JAMES & GRAY, *supra* note 32, § 19.5, at 23–25.

59. *Byrne*, 159 Eng. Rep. at 300.

inference that the defendant was negligent in fact.⁶⁰ Or second, one can reach this conclusion based upon the simple policy argument that it is better to allow a plaintiff to recover from a statistically-probably-negligent defendant (even if the probability tells us *nothing* about what *actually* occurred on the particular occasion) than it is to totally bar recovery for an innocent, injured plaintiff with a statistically-probably-meritorious claim.

The first line of reasoning is as wrong as the second line of reasoning is right. However, to illustrate why abstract probabilities do not justify drawing a straightforward factual inference about what happened on a particular occasion, it is necessary to examine and deconstruct the two assumptions that are essential to this line of reasoning.

A. Different Types of Probability

By simply inserting the word “ordinarily” into the doctrine of *res ipsa loquitur*, many courts and commentators have implied (again, perhaps inadvertently) that in the area of *res ipsa*, if an abstract probability suggests that a defendant was negligent, this justifies drawing a straightforward inference that a defendant was, in fact, negligent.⁶¹ Again, this line of thought seems to flow from the notion that all evidence (direct as well as circumstantial) is probabilistic to a certain degree and, therefore, any probabilistic data is equally probative for resolving the issue of liability, especially given the usual burden of proof in a tort case, which merely requires proof by a preponderance of the evidence.⁶²

However, other commentators have pointed out an important distinction between various types of probabilistic data.⁶³ Professor Richard W. Wright, in particular, has highlighted the existence of different types of probabilities by distinguishing between naked statistics (which are not causally related at all: for example, the percentage of blue-colored buses in a town), *ex ante* causal probabilities (which relate to “general causation” or causal capacity: the *frequency* with which a condition of a certain type causes a result of a certain type), and *ex post* causal probabilities (which

60. RESTATEMENT SECOND, *supra* note 13, § 328D cmts. c & d. This method of reasoning, unfortunately, is suggested by the *Restatement Second* in these comments.

61. *Id.* § 328D; PROSSER, *supra* note 1, § 42, at 202 (suggesting that the occurrence of a certain type of accident that does not ordinarily occur in the absence of negligence is itself *evidence* that the accident was negligently caused).

62. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. b (assuming that the occurrence of an accident that does not ordinarily occur in the absence of negligence serves as circumstantial evidence that a defendant was in fact negligent).

63. See, e.g., Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913, 921 & accompanying notes (1992); Judith Jarvis Thomson, *Liability and Individualized Evidence*, 49 LAW & CONTEMP. PROBS. 199, 203–06 (1986); Wright, *Bramble Bush*, *supra* note 43, at 1050–67.

relate to "specific causation": whether some actual condition actually caused some actual result on this particular occasion).⁶⁴ For our purposes, we can lump these various types of probabilities into two general categories: (1) non-specific probabilities (naked statistics and *ex ante* causal probabilities) and (2) case-specific probabilities (*ex post* causal probabilities). Non-specific probabilities are based upon data that is totally independent of the particular occasion in question and therefore do not reflect which potentially applicable causal explanation of an event or injury was actually instantiated on the particular occasion. In other words, non-specific probabilities say *nothing* about what actually took place on a given occasion. An example of a non-specific probability is the one discussed above, namely, the probability that, because a defendant fails to stop at a particular stop sign fifty-five percent of the time, he probably did not stop on the occasion in question. Notice that in this example, the non-specific probability in no way provides the trier of fact with the evidence necessary to resolve the question of liability. Indeed, while the non-specific probability assists one in betting on what will occur in the future or what *likely* occurred in the past (even if it is a small likelihood), it does *nothing* to indicate what actually *did* occur.⁶⁵

Unlike a non-specific probability, a case-specific probability is one that takes the concrete and particularistic pieces of evidence about the specific circumstances of a particular case into account. One arrives at a case-specific probability by gathering the available concrete, particularistic (direct and circumstantial) evidence of what actually happened in a case and then comparing such evidence against all the possible causal explanations of the event.⁶⁶ Through this process, the available specific evidence helps determine the likelihood (*ex post* causal probability) that a particular causal explanation was actually instantiated on the occasion in question. For example, a piece of evidence that would be necessary for the instantiation of one potential causal explanation would increase the likelihood that that particular explanation was actually instantiated. Conversely, if that piece of evidence was incompatible with the instantiation of another possible causal explanation, then that causal explanation would be eliminated. And finally, if an available piece of evidence is necessary for every possible causal explanation, such evidence would be wholly neutral for determining which explanation was actually instantiated. In sum, one uses the available evidence that is particular to the case at hand in order to determine the likeli-

64. Wright, *Bramble Bush*, *supra* note 42, at 1050–51.

65. *Id.* at 1050–52.

66. *Id.*

oods (*ex post* causal probabilities) of various plausible causal explanations of the event at issue.⁶⁷

One sees, then, that a large distinction exists between abstract, non-specific probabilities and case-specific probabilities. While abstract, non-specific probabilities are detached from the facts of a given case and thus provide no information on what actually occurred on a particular occasion, case-specific probabilities are truly helpful since they are based upon the known evidence about the specifics of a particular case and reflect the probability that a particular causal story was the one that was actually instantiated in that case. Although even case-specific probabilities (and *de facto*, direct and circumstantial evidence, upon which case-specific probabilities are based) do not indicate with absolute certainty what actually occurred, because they are based on case-specific evidence, they provide relevant and useful information to the trier of fact in determining what causal story was actually instantiated.⁶⁸

One would assume that courts and commentators recognize the distinction between abstract, non-specific probabilities and case-specific probabilities. Most of the time, this assumption would be correct, especially when the non-specific probability is a naked (not causally-related) statistic. Because of their obvious inability to say anything about what actually took place on a given occasion, courts have generally refused to accept naked statistics as relevant evidence of who or what caused a particular injury.⁶⁹ They have correctly viewed such naked statistics as insufficient to satisfy the preponderance of the evidence standard, no matter how high the probabilities might be⁷⁰ and have instead allowed a defendant to be held liable only based upon case-specific probabilities (due to their case-specific nature and resulting relevance).⁷¹

67. *Id.*

68. *Id.*

69. *Id.*; see also *Smith v. Rapid Transit*, 58 N.E.2d 754 (Mass. 1945). In this case, the plaintiff was operating her vehicle in the early morning hours when a bus traveling in the opposite direction forced her off the road and into a parked vehicle. *Id.* at 754. The plaintiff proffered no particularistic evidence, but only (1) that the defendant bus company was the only company that had been granted authority to operate a bus route upon the street where the accident took place, and (2) that the bus schedule indicated that defendant's busses would have been operating at the time at which the accident occurred. *Id.* at 754–55. The court directed a verdict for the defendant stating that it is “not enough that mathematically the chances somewhat favor a proposition to be proved.” *Id.* at 755 (citing *Sargent v. Mass. Accident Co.*, 307 Mass. 246, 250 (1940)).

70. *Smith*, 58 N.E.2d at 755; *Guenther v. Armstrong Rubber Co.*, 406 F.2d 1315, 1318 (3d Cir. 1969); *Spencer v. Baxter Int'l, Inc.*, 163 F. Supp. 2d 74, 80 n.7 (D. Mass. 2001); see also *Wright, Bramble Bush*, *supra* note 43, at 1050 nn.271–72.

71. Drawing the line here makes sense. While a risk of error still exists with allowing recovery based upon *ex post*, case-specific probabilities, that risk is obviously much lower than the risk that would accompany allowing recovery based upon abstract, *ex ante* probabilities. As we have noted, case-

When it comes to the doctrine of *res ipsa loquitur*, however, courts (apparently) have not been so skeptical of abstract, non-specific probabilities. Indeed, whether they realize it or not, by formulating *res ipsa* as merely requiring that the injury be of such a nature that it “ordinarily would not occur in the absence of negligence,” they have opened the door to allowing recovery based upon the same type of probabilistic information that they have explicitly rejected in other types of cases.⁷² This is particularly remarkable when one considers that of all the various types of cases, those involving *res ipsa loquitur* are the ones most likely to be lacking in any specific evidence of negligence. Hence, courts should be on high-alert.

B. Is the “Preponderance of the Evidence” Merely a Greater Than Fifty Percent Probability?

This brings us to consideration of the second problematic assumption underlying the notion that non-specific probabilities allow the trier of fact, under the *res ipsa loquitur* doctrine, to draw a straightforward, factual inference of negligent causation. This second assumption may (and often does) exist in any situation where the trier of fact draws an inference based upon probabilistic information, including negligence actions involving case-specific direct or circumstantial evidence, since even such case-specific evidence only gives rise to case-specific *probabilities* rather than certainties regarding what actually occurred.

The fact that all evidence, even case-specific evidence, is essentially probabilistic leads many to assume that proving a proposition is always merely a matter of reaching a certain numerical threshold or probability,

specific probabilities are based on case-specific evidence and are thus highly relevant. *Ex ante*, non-specific probabilities, on the other hand, provide no information about what actually occurred in the particular case.

72. This general aversion to abstract, class-based probabilistic data has also been highlighted in various opinions where courts have rejected certain controversial legal doctrines. For example, when presented with the issue of whether to adopt the doctrine of proportionate liability based on market shares, some courts have rejected the doctrine altogether on the basis that to accept such a doctrine would be to allow “too great a deviation” from traditional tort principles. *See, e.g.,* *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 344–45 (Ill. 1990). Their point has been that to allow recovery based upon an abstract probability indicating how much of the market share a particular defendant produced is unreliable due to the fact that the statistic says nothing about whether the particular defendant actually caused the particularly injury at issue. *Id.* at 343–45. Ironically, however, even the courts that have adopted the doctrine seem to possess similar concerns. *See Sindell v. Abbott Laboratories*, 607 P.2d 924, 936–38 (Cal. 1980). In *Sindell*, the California Supreme Court appears to have accepted the proportionate liability doctrine at least partly out of the concern that basing liability on an abstract probability of causation would allow a defendant to be held fully liable for *every* injury caused by a product if such defendant produced greater than fifty percent of the product on the market. *Id.* Whether courts have accepted the doctrine of market share liability, however, is not the point; the primary point is that courts are wary of abstract, class-based statistics in this area.

and that the “preponderance of the evidence” standard in a tort action merely requires that the probability be greater than fifty percent.⁷³ However, there are significant problems with this assumption as well.

In all cases, even if the probabilities being employed are *ex post*, case-specific probabilities of what actually occurred rather than mere *ex ante*, non-specific probabilities, a risk exists that the “probable” causal explanation was not actually instantiated on the occasion at issue. Therefore, even if the trier of fact follows the *ex post*, case-specific probabilistic information in such a case, she may arrive at the wrong conclusion. This reality raises the question of whether in *any* case (whether those involving direct evidence or circumstantial evidence, case-specific probabilities or non-specific probabilities) the preponderance of the evidence standard should be equated with a mere numerical probability, namely, any probability greater than fifty percent. In other words, should triers of fact engage in the practice of equating evidentiary standards with numerical probabilities? Two primary reasons exist for answering this question in the negative. First, equating an evidentiary standard with a mere numerical probability again submerges the distinction between various types of probabilities and fails to clarify for the trier of fact what *type* of evidence is required to satisfy the standard. And second, equating the preponderance of the evidence with a greater than fifty percent probability misleads the trier of fact since it encourages a focus on the percentage of probability rather than independently evaluating and weighing the evidence to see if such evidence establishes a *belief* within her that rises to the requisite degree of certainty. For example, in a tort action, instead of instructing (or allowing) jurors to equate the preponderance of the evidence with a greater than fifty percent probability and to impose liability when the probability of instantiation of the relevant causal story rises above fifty percent, courts generally ask jurors to consider and weigh all of the evidence and to make a determination as to whether such evidence has generated a *belief*—no matter how minim-

73. Thomson, *supra* note 63, at 200; RESTATEMENT THIRD, *supra* note 10, § 17 cmt. d; CLOSING INSTRUCTIONS – DEFINITION OF PREPONDERANCE OF THE EVIDENCE, ALASKA CIVIL PATTERN JURY INSTRUCTIONS 02.04 (1981, Revised 1999) available at <http://www.state.ak.us/courts/insciv/02.04.doc>. The instructions state that the preponderance of the evidence standard is satisfied:

... if you believe that there is a greater than 50 percent chance that it is true. Fifty-one percent probability is enough; no more is required for you to decide that something is more likely true than not true. If you believe that the chance that something is true is 50/50 or less, you must decide that it is not true.

Id. But see L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 76–81 (1977); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1331–32 (1982) (indicating that many judges object to and refuse to interpret burdens of proof in terms of quantitative probabilities when asked to do so by researchers); see also Wright, *Possible Wrongs*, *supra* note 39, nn.68–70 & accompanying text.

al—that a particular causal explanation was instantiated on the relevant occasion.⁷⁴ Such a belief is generated when the *ex post*, case-specific probability that one causal story was actually instantiated sufficiently outweighs, qualitatively and quantitatively and in a manner differing for each decision maker, the *ex post*, case-specific probability of any competing story.⁷⁵ If the evidence has generated even a minimal *belief* that the defendant was negligent, then—and only then—has the preponderance standard been satisfied.⁷⁶ This focus—on *belief*, rather than on a mere numerical probability—is the correct approach insofar as it causes the trier of fact to focus on the evidence in any given case, rather than upon a distracting numerical probabilistic figure. As a result, the preponderance of the evidence standard cannot and should not be equated with a statistical probability.

III. WHY THE *SECOND RESTATEMENT* GOT IT RIGHT (ALMOST)

Despite the fact that including “ordinarily” in the formulation of *res ipsa* opens the door to recovery by a plaintiff in the absence of any case-specific evidence that the defendant was negligent or even contributed to the plaintiff’s injury, courts have continued to allow recovery based upon abstract probabilities where the plaintiff is unable, due to the nature of the accident, to offer specific evidence that the defendant negligently caused the injury. Even as this door to attaching liability has been swung open, however, courts have simultaneously added various limiting instructions to the doctrine of *res ipsa* in the hope that such limitations will serve as safeguards that will assist in reducing the possibility of subjecting innocent defendants to liability.⁷⁷

Given proper limiting instructions, the decision to allow liability based upon abstract probabilities under the broader version of *res ipsa loquitur*

74. 3 KEVIN F. O'MALLEY, JAY E. GREINIG & WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS (CIVIL)* § 104.01, at 135 (5th ed. 2000)). Juries are frequently instructed that:

To ‘establish by a preponderance of the evidence’ means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more *convincing* force, and produces in your minds *belief* that what is sought to be proved is more likely true than not true.

Id. (emphasis added). See also Wright, *Bramble Bush*, *supra* note 43, at 1065 n.339 (indicating that empirical studies have discerned that few judges, jurors, or lay persons interpret the “preponderance of the evidence” as requiring merely a greater-than-fifty-percent probability); *Livanovitch v. Livanovitch*, 131 A. 799, 800 (Vt. 1926) (quoting the trial court’s jury instruction: “If . . . you are more inclined to believe from the evidence that he did so deliver the bonds to the defendant, even though your belief is only the slightest degree greater than that he did not, your verdict should be for the plaintiff.”).

75. Wright, *Bramble Bush*, *supra* note 43, at 1051–52.

76. Wright, *Possible Wrongs*, *supra* note 39, at 1311–17.

77. DOBBS, *supra* note 1, § 154, at 371, § 157, at 378–81, § 160, at 385–88.

doctrine is ultimately a good one. This conclusion is reached only by way of the policy consideration, discussed *supra*, that it is better to burden a probably negligent defendant with exculpating himself from liability than it is to bar recovery by a plaintiff with a probably-meritorious claim. However, the justification for doing so—to allow recovery where it is appropriate and to bar recovery where it is not—depends heavily upon the phraseology and proper application of the limiting instructions that accompany the core rule of *res ipsa*.

A. *The Limiting Instructions*

Even as courts have made the policy-motivated leap in the area of *res ipsa* of allowing recovery based on abstract probabilities, they have simultaneously evinced a lack of ease in doing so and a fear that *res ipsa* is perhaps being extended too far.⁷⁸ As a result, almost all courts over the decades have added various limiting instructions to the core rule. In the introduction, I pointed out that in *res ipsa* cases, despite a plaintiff's inability to offer specific evidence that the defendant negligently caused her injury, the plaintiff must still proffer some sort of evidence indicating that: (1) someone's negligence caused her injury and (2) the defendant was that someone. All of the limiting instructions that courts have utilized over the years directly relate to the second requirement: the proper identification of the responsible person.

Certain limiting instructions enjoyed great popularity for long periods of time. One such limitation, which is still often stated but rarely literally enforced, requires that the defendant must have had exclusive control over the thing causing the injury⁷⁹ or, even more strict, that the "defendant had exclusive control over the plaintiff and over instrumentalities affecting the plaintiff" at the time of the injury.⁸⁰ Over time, many courts have come to realize that this requirement is simply too strict and undermines the purpose for which *res ipsa* exists.⁸¹ Moreover, they have recognized that the defendant's exclusive control is merely one way of implicating the defendant as the responsible party and that other types of evidence might serve that pur-

78. *Id.* § 154, at 371.

79. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 438 (Cal. 1944).

80. *Haas v. United States*, 492 F. Supp. 755, 761 (Mass. 1980) (emphasis added).

81. RESTATEMENT SECOND, *supra* note 13, § 328D cmt g; see e.g., *Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1362 (La. 1992) (stating that "[t]he second requirement, that the defendant have exclusive control over the thing, has not, in our jurisprudence, been strictly applied.").

pose.⁸² As a result, this element, even when it is included as a limiting instruction, is almost never literally applied.⁸³

Another popular limiting instruction was the requirement that the available evidence sufficiently eliminate the possibility that the plaintiff negligently contributed to his or her own injury⁸⁴ or, even more broadly, that there have been no “voluntary contribution by the plaintiff.”⁸⁵ Interpreted literally, this requirement could never be satisfied, since the plaintiff always contributes to his or her own injury, if only by causing herself to be at the place where the injury occurred at the time that it occurred. Moreover, now that contributory negligence is no longer a complete defense and comparative negligence is the generally accepted doctrine, this element is overly restrictive even if it merely requires (as presumably was intended) proof of no *negligent* contribution by the plaintiff. Many courts have held that an inference of causal negligence by the defendant is permissible even if evidence exists that the plaintiff was contributorily negligent.⁸⁶

Courts have also attempted to control a plaintiff's resort to *res ipsa* through requiring that a defendant have superior access than the plaintiff to evidence of what actually occurred.⁸⁷ This requirement proved handy in many of the same cases where the exclusive control requirement would have been helpful; it often would be satisfied where the defendant was in control of the instrument causing the harm.⁸⁸ A good example would be actions by passengers against carriers. However, cases also exist where a defendant lacks superior access to the evidence, but where courts should not prohibit the use of *res ipsa loquitur*. Examples might include a bottle exploding,⁸⁹ a grenade detonating prematurely,⁹⁰ or certain situations where a falling object strikes a passerby.⁹¹ Although a defendant in one of these or other situations might not have superior knowledge as to why an accident or malfunction occurred, courts have applied and should apply *res ipsa*.

82. DOBBS, *supra* note 1, § 157, at 378.

83. *E.g.*, *Escola*, 150 P.2d at 438–39.

84. PROSSER, *supra* note 1, § 42, at 199.

85. *Ochoa v. Vered*, 186 P.3d 107, 114 (Col. Ct. App. 2008).

86. *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66, 70 (Col. 1980); *Giles v. City of New Haven*, 636 A.2d 1335, 1341–42 (Conn. 1994); *Dyback v. Weber*, 500 N.E.2d 8, 12 (Ill. 1986); *Tipton v. Texaco, Inc.*, 712 P.2d 1351, 1359 (N.M. 1985); *Watzig v. Tobin*, 642 P.2d 651, 654–65 (Or. 1982); *Cyr v. Green Mountain Power Corp.*, 485 A.2d 1265, 1269 (Vt. 1984); *Turk v. H. C. Prange Co.*, 119 N.W.2d 365, 372 (Wis. 1963).

87. *Cox v. May Dep't Store Co.*, 903 P.2d 1119, 1124 (Ariz. 1995).

88. *See* DOBBS, *supra* note 1, § 160, at 386–87.

89. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 437–38 (Cal. 1944).

90. *See, e.g.*, *McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774, 774 (5th Cir. 1988).

91. *See, e.g.*, *Anderson v. Serv. Merch. Co., Inc.*, 485 N.W.2d 170, 172–73 (Neb. 1992).

B. Restatement (Second) of Torts, § 328D

Although the above limiting instructions do not cover the entire gamut of those utilized by the courts in their attempts to curb an overly broad operation of *res ipsa loquitur*, such limiting instructions have often proved to be too strict or even unhelpful for accomplishing their intended purpose. Various opinions can be found where limiting instructions prevented recovery in cases that appear legitimate⁹² and allowed recovery in others where the invocation of *res ipsa* seems particularly suspect.⁹³

Amid the confusion created by these various limitations, the formulation of *res ipsa loquitur* found in the *Restatement (Second) of Torts* emerged.⁹⁴ Although not perfect, this formulation went a long way towards arriving at an articulation of *res ipsa* that took proper consideration of the predicament of a plaintiff who is unable to prove specific acts of negligence because of the nature of the accident while still including a relatively strong and helpful limiting instruction so as to avoid subjecting individuals to liability who: (a) acted reasonably with regard to the accident/injury; (b) had absolutely no connection to the accident/injury; (c) both a and b; or (d) acted negligently but such negligence did not cause the accident/injury.

Restatement (Second) of Torts § 328D reads in its entirety as follows:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may be reasonably drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.⁹⁵

92. PROSSER, *supra* note 1, § 42, at 205 & n.30; *see* Kilgore v. Shepard Co., 158 A. 720, 721 (R.I. 1932).

93. Calabretta v. Nat'l Airlines, Inc., 528 F. Supp. 32, 35 (E.D.N.Y. 1981) (allowing recovery against an airline under *res ipsa* where an airline passenger suffered a hearing loss after she experienced ear pain while the airplane was in descent). While the presence of the exclusive control limiting instruction was not likely the only cause for the dubious result reached by the court here, the fact that it was satisfied may likely have led the court to reach the result that it did. *Id.* at 35-36.

94. RESTATEMENT SECOND, *supra* note 13, § 328D.

95. *Id.*

The concern for injured plaintiffs is illustrated in the *Restatement Second* by the choice of the drafters to include the word “ordinarily” in the wording of the doctrine.⁹⁶ The drafters discerned that the trier of fact should be allowed to draw an inference of negligence where past experience “reasonably permits the conclusion that such events do not ordinarily occur unless someone has been negligent.”⁹⁷ By allowing the trier of fact to draw the inference on the basis of common experience, the *Restatement Second* agrees with the great weight of authority that proving negligence may be accomplished by pointing to abstract probabilities alone in the absence of any concrete, case-specific evidence.⁹⁸ In other words, an abstract probability is deemed sufficient, in the context of *res ipsa*, to show that negligence was the cause of an injury.⁹⁹

Immediately following the recitation of the core *res ipsa* rule, however, the drafters of the *Restatement Second* included a new limiting instruction in place of the traditional ones discussed previously. The instruction reads: “(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence.”¹⁰⁰

C. *The Purpose of the Subsection (b) Limiting Instruction*

In order to properly understand this limiting instruction, it is necessary to interpret the word “responsible” as “possibly negligent.”¹⁰¹ This interpretation is necessary because the drafters make clear in their comments that once one has moved from the core rule of *res ipsa* to the limiting instruction, the analysis of whether negligence was the cause of the injury has terminated and the focus has now shifted to identifying the party who engaged in the negligent conduct.¹⁰² The accompanying comment describes the purpose of this limiting instruction in relation to the core rule of *res ipsa* by stating that, “It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still neces-

96. *Id.* & cmt. c.

97. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. c.

98. Unfortunately, it appears in comments c, d, and especially e that the drafters arrived at this result incorrectly by believing that abstract probabilities allow the trier of fact to draw a straightforward inference of negligence sufficient to satisfy the preponderance of the evidence standard. However, this is not completely clear. See RESTATEMENT SECOND, *supra* note 13, § 328D cmts. c, d & e.

99. *Id.* at cmts. d & e.

100. *Id.* § 328D(1)(b).

101. Wright, *Basic Principles*, *supra* note 42, Chapter 5, § B.3, at 366.

102. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. f.

sary to make the negligence point to the defendant.”¹⁰³ Therefore, the focus of the limiting instruction is clearly on the identity of the tortfeasor.

If, on the other hand, the phrase “responsible causes” were interpreted to include all possible explanations of the injury, including those for which no negligent conduct was involved, the plaintiff would be required to prove that the defendant’s (presumed negligent) conduct was the *sole* cause of the plaintiff’s injury, without any negligent or non-negligent contribution by the plaintiff or any third party or by natural events—which would never be true. If, however, the word “responsible” is interpreted as “possibly negligent,” then the focus of the limiting instruction is on ensuring that it was the *defendant’s* (presumed) negligence that caused the plaintiff’s injury, as the accompanying comment suggests it should be, and not the possibly negligent conduct of some other person.¹⁰⁴

Even as so interpreted, the subsection (b) limitation is too strict. Because of the fairly recent shift in tort law from contributory negligence serving as an absolute bar on recovery to comparative responsibility, which generally occurred after subsection (b) was drafted, the requirement in subsection (b) that the plaintiff prove she did not negligently contribute to her injury is now too strict. Many jurisdictions have explicitly stated that evidence that a plaintiff negligently contributed to the injury no longer automatically bars recovery under *res ipsa* while other courts have arrived at the same result implicitly.¹⁰⁵ Nor should the possibility of negligent contribution by other defendants *automatically* bar use of the *res ipsa* doctrine. Rather, in such cases the plaintiff should still be allowed to utilize the doctrine if negligent conduct by the plaintiff or other defendants would not have been sufficient to produce the injury in the absence of (the presumed) negligent conduct by the defendant. Subsection (b) should be revised to require that other possibly negligent causes, including the conduct of the plaintiff and third persons, have “either (i) been sufficiently eliminated by the evidence or (ii) would not have been sufficient to produce the harm in the absence of negligence by the defendant.”¹⁰⁶

D. The Necessity of the (Revised) Subsection (b) Limiting Instruction

As modified, the subsection (b) limiting instruction contains an enormously important concept which plays a fundamental and necessary

103. *Id.*

104. *Id.*

105. *See supra* note 86.

106. Wright, *Basic Principles*, *supra* note 42, Chapter 5, § B.3, at 366.

role in properly achieving the goals underlying *res ipsa loquitur*. The limitation requires that the plaintiff's evidence must sufficiently eliminate all other explanations of the injury where negligence by the plaintiff or third parties might have been the cause in the absence of any negligence by the defendant. There are two reasons why this limiting instruction is so helpful.

First, the existence of such a limiting instructions still allows room for the policy concern underlying *res ipsa*: that there are situations where an injured plaintiff should be entitled to recover even though she is unable to produce specific evidence of a defendant's negligent conduct. In other words, this limiting instruction does not prevent the operation of the "ordinarily" language in the core rule of *res ipsa loquitur* and, hence, a plaintiff may still recover where only abstract probabilities suggest that negligence was the cause of the injury. Hence, the policy concern is satisfied.

The second reason why this limiting instruction is so important is because it effectively balances the allowance of recovery based on a non-specific statistical probability of negligent causation by requiring that *something*, rather than nothing but an abstract probability, indicate this particular defendant's (probably negligent) involvement in the plaintiff's injury.¹⁰⁷ It is not enough, in other words, to tell the defendant that "this type of injury usually occurs because of negligence by people like you." On the contrary, this instruction requires that the plaintiff offer concrete, case-specific evidence indicating the identity of the relevant defendant who was "probably negligent" under the core rule of *res ipsa*. Therefore, while the nature of the injury *may* probabilistically indicate that the defendant was negligent, the available evidence *must* indicate that the person has been identified as the "probably negligent" cause of the injury.¹⁰⁸ If more than one plausible causal story of the injury exists where *either* the defendant negligently caused the injury *or* some third party negligently caused the injury, and the evidence does not eliminate one of these explanations, a plaintiff has not satisfied this element and, hence, cannot recover.

This may seem at first glance to undercut the purpose for which *res ipsa* exists. It does not, but rather provides a critically important safeguard against abuse of the doctrine. By allowing recovery where the injury suffered by the plaintiff does not ordinarily occur in the absence of negligence, the door is opened to recovery in situations where negligence may not have been the cause of the injury in order to protect injured plaintiffs. However,

107. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. f (stating that "[i]t is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant.").

108. See *infra* text following note 117.

if we do not then enforce a strong limiting instruction that requires the plaintiff to present case-specific evidence that she has identified the correct “probably negligent” cause, then *res ipsa* has been extended too far and recovery will be allowed and encouraged in situations where nothing but an abstract probability indicates that *somebody*—anybody, for that matter—was *probably* negligent and that such probable negligence probably caused the plaintiff’s injury. To allow this is to let the policy concern for injured plaintiffs swallow up the requirement that the evidence must show in some way that a particular defendant probably acted negligently and thereby caused the plaintiff’s injury on the specific occasion.

Although this may sound like a significant burden for plaintiffs that effectively cancels out the protection afforded by the core rule of *res ipsa*, common sense indicates that in the vast majority of cases plaintiffs will have a much easier time gathering evidence that implicates a particular individual than they will have gathering specific proof that the individual was negligent. Consider *Byrne v. Boadle*, for example.¹⁰⁹ Although the plaintiff had absolutely no evidence of what went wrong in that case, it was relatively easy for him to gather evidence indicating that the defendant was the source of whatever might have gone wrong.¹¹⁰ Likewise, in a case where a hand grenade explodes, the plaintiff may have a hard time explaining to a jury *what* went wrong, but a relatively easy time indicating *who* was responsible for whatever might have gone wrong.¹¹¹ Therefore, requiring the plaintiff to produce case-specific evidence indicating the identity of the wrongdoer, at least by excluding other possible wrongdoers, is not so heavy a burden as one might initially think.

In sum, given subsection (b), the *Restatement Second* sufficiently expands *res ipsa* to serve those unfortunate plaintiffs who are able to offer only abstract probabilistic evidence of negligence while still tightening down the doctrine to require plaintiffs to offer case-specific evidence regarding the identity of the wrongdoer. The result is that subsection (b) plays a crucial role in reducing the instances in which wholly innocent and ignorant individuals will be subjected to liability. To accomplish this, however, subsection (b) must still be applied properly.

109. *Byrne v. Boadle*, 159 Eng. Rep. 299.

110. *Id.* at 299–300.

111. *See, e.g., McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774, 776–77 (5th Cir. 1988).

E. Clarifications on How Subsection (b) Should Be Enforced

Although subsection (b) seems to solve the problems inherent in many other limiting instructions, courts must still be aware of at least two potential ways in which it might be misapplied. First, although it may at first sound contradictory, it is necessary to point out that every other causal explanation of an injury involving negligence by someone other than the defendant need not be eliminated by the evidence. Rather, only those explanations *that conflict with* the plaintiff's explanation of the injury must be sufficiently eliminated by the evidence. In other words, if two plausible causal explanations exist that involve negligence by two different parties and such causal explanations conflict with one another (such that *either* one defendant *or* the other was negligent, but not both), subsection (b) has not been satisfied. Indeed, in such a scenario, the trier of fact *ipso facto* could not reasonably conclude that the available evidence had "sufficiently eliminated" all plausible sources of causal negligence other than the defendant.

However, the situation is different if the plausible sources of causal negligence do not conflict, but rather concur. The reason underlying this is the obvious reality that there is not necessarily one and only one negligent cause of any given injury. Indeed, it is for this reason that joint and several liability exists. In any given negligence action, two (or more) parties can behave negligently and can each be held liable for a single injury to a plaintiff, so long as both of them were a cause of such injury. For example, in a medical malpractice action, both a doctor and a nurse may have negligently caused the plaintiff's injury. Moreover, "but-for causation" may exist with regard to both defendants such that if either the nurse *or* the doctor had acted reasonably, the injury would not have resulted. In such a situation, the plaintiff obviously need not eliminate the nurse as a possible cause of the injury under subsection (b) so as to hold the doctor liable under *res ipsa*. The reason why: the causal story of the doctor's negligence does not *conflict* with the causal story of the nurse's negligence. Rather, both defendants acted negligently and the plaintiff can hold either or both liable under *res ipsa* by establishing that the possible negligence of the other defendant, by itself, would not have been sufficient to produce the plaintiff's injury.

If, on the other hand, *either* the doctor *or* the nurse caused the injury, but not both, the limiting instruction has not been satisfied and, hence, the plaintiff cannot prevail under *res ipsa*. The proper formulation of the limiting instruction requires that the evidence must *either* eliminate all plausible negligent causes of an injury other the defendant's presumed negligence *or* such other possible negligent causes must, in and of themselves, have been

insufficient to have produced the injury absent negligent conduct by the defendant.¹¹²

The second point regarding the limiting instruction in subsection (b) that must be clarified is that courts should not allow this limiting instruction to operate in the same way as the core rule of *res ipsa loquitur*. Abstract probabilities should not be able to “sufficiently eliminate”¹¹³ other potential defendants.¹¹⁴ In other words, it should not be enough to present abstract probabilities indicating that the type of injury at issue is both “ordinarily” caused by negligence and “ordinarily” committed by somebody like the defendant. The limiting instruction itself is phrased rather well in this regard insofar as it says that other possible explanations must be “sufficiently eliminated *by the evidence*,”¹¹⁵ that is, case-specific facts must eliminate all other (conflicting) negligent causes or reduce them to such a small likelihood that their instantiation would be considered implausible. In short, abstract probabilities are not “evidence” under subsection (b).

However, although subsection (b) itself is phrased rather well, the comments accompanying subsection (b) confuse the matter and obfuscate what the instruction clearly requires on its face. In comment *f*, the drafters state:

It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant. *On this too* the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is no doubt that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case. Again, however, the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more likely than not, that of the defendant.¹¹⁶

112. Wright, *Basic Principles*, *supra* note 42, Chapter 5, § B.3, at 366.

113. RESTATEMENT SECOND, *supra* note 13, § 328D(1)(b).

114. Indeed, courts have generally said that abstract probabilities *cannot* be used to show that a particular defendant was negligent. Rather, case specific evidence, whether direct or circumstantial, is a necessary precondition for recovery. *See, e.g.,* DiPalma v. Westinghouse Elec. Corp., 938 F.2d 1463, 1465 (1st Cir. 1991); Biggs v. Logicon, Inc., 663 F.2d 52, 54 (8th Cir. 1981) (stating that “[t]here is no evidence to suggest that defendant’s conduct is more responsible for plaintiff’s injury than the conduct of others); Barnes v. United States, 349 F.2d 553, 555–56 (5th Cir. 1965); Carlos v. MTL, Inc., 883 P.2d 691, 701 (Ha. Ct. App. 1994) (stating that, “[e]ven if an accident and its attendant circumstances ‘cry loudly of someone’s negligence,’ the *res ipsa loquitur* doctrine will not apply unless the plaintiff produces evidence connecting the defendant as the negligent party.”).

115. RESTATEMENT SECOND, *supra* note 13, § 328D (emphasis added).

116. *Id.* § 328D cmt. *f* (emphasis added).

Unfortunately, with these comments, the drafters seem to transform the limiting instruction, like the issue of negligence, into a mere matter of abstract probabilities.¹¹⁷ They do so in two ways. First, although the drafters require that a plaintiff prove this element by a preponderance of the evidence, they do not state that this burden must be satisfied with actual evidence, or even better, with “case-specific” evidence. Rather, the comment simply states that the plaintiff must “make the negligence point to the defendant.”¹¹⁸ But, as anyone knows and as comment *f* can be read to imply, an abstract probability can “point” to a defendant without saying anything about whether that defendant negligently caused the injury.¹¹⁹

A second way in which the drafters’ comments confuse how subsection (b) should be understood and applied lies in the drafters’ apparent understanding of the “preponderance of the evidence” standard. In reference to the limiting instruction, comment *f* reads “[o]n this too the plaintiff has the burden of proof by a preponderance of the evidence,” thereby indicating the drafters’ intent that the preponderance of the evidence standard here is satisfied in the same way as it is with regard to proving negligence in *res ipsa* cases, namely, through purely abstract, *ex ante*, statistics.¹²⁰ However, although the courts have made a special exception for proving *negligence* in *res ipsa* cases such that the preponderance of the evidence standard can be satisfied with respect to the core rule in subsection (a) by abstract probabilities, this does not mean that courts should allow subsection (b) to be satisfied in the same manner. Indeed, the very opposite is true. As soon as subsection (b) is interpreted as an element that also can be satisfied with abstract probabilities, *res ipsa* has mutated into a doctrine that invites recovery by plaintiffs where there has been no case-specific proof of negli-

117. It should be pointed out, however, that despite the fact that the drafters of the *Restatement Second* sometimes suggest that subsection (b) can be satisfied with abstract probabilistic evidence, this is contrary to the blackletter of subsection (b) and to the overall thrust of the comments insofar as several of the comments consist of attempts to ensure that the inferred causal negligence was that of the particular defendant. See, e.g., RESTATEMENT SECOND, *supra* note 13, § 328D cmt. g (discussing case-specific evidence of the defendants’ control of the instrumentalities of harm), cmt. i (discussing the requirement, although it is now obsolete, that a plaintiff offer case-specific evidence showing she did not negligently contribute to her own injury), & cmt. n (discussing the possibility that defendants may offer case-specific evidence indicating that they did not act negligently or that, if they did, such negligence was not the cause of the plaintiff’s injury).

118. *Id.* at cmt. f.

119. For example, an *ex ante* probability might point to a particular defendant as being “probably negligent,” without indicating in any way that such defendant was negligent in fact.

120. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. f; *cf. id.* at cmt. e:

The plaintiff’s burden of proof . . . requires him to produce evidence which will permit the conclusion that it is more likely than not that his injuries were caused by the defendant’s negligence. Where the probabilities are at best evenly divided between negligence and its absence, it becomes the duty of the court to direct the jury that there is not [sic] sufficient proof.

Id.

gence or even probable negligence *by the defendant*. Therefore, courts should not allow subsection (b) to operate in the same way as the core rule of *res ipsa*, but rather must apply it according to its own terms: stringently and requiring case-specific “evidence” that the defendant was the probably-negligent individual—a requirement which we have seen is not overly-burdensome to plaintiffs.

If subsection (b) is applied appropriately with these concerns in mind, it effectively complements the core rule of *res ipsa* insofar as it gives due consideration to the plight of injured plaintiffs while also tightening down the doctrine so as to prevent *res ipsa loquitur* from becoming a doctrine based purely upon abstract probabilities and absolutely no case-specific evidence.

IV. RES IPSA LOQUITUR IN THE RESTATEMENT (THIRD) OF TORTS: A STEP IN THE WRONG DIRECTION

Unfortunately, in the approved final draft of the *Restatement (Third) of Torts: Liability for Physical Harm* § 17 (2005) (hereafter *Restatement Third*), the American Law Institute (ALI) took a step in the wrong direction when it offered a new and highly-modified formulation of *res ipsa loquitur*. Indeed, the drafters of the *Restatement Third* decided to eliminate entirely subsection (b) from its formulation of *res ipsa*.¹²¹ By doing so, the ALI has moved the doctrine a step away from the goals it is intended to serve and has made it more difficult for courts and juries to understand and apply. The formulation in the *Restatement Third* collapses the entirety of the *res ipsa* doctrine into a single sentence with no elements.¹²² Although the ALI offered reasons for this dramatic change in the accompanying comments, those reasons are unpersuasive in several respects. The changes, which result from a misunderstanding of the traditional requirements of proof, including the preponderance of the evidence standard,¹²³ enhance the possibility of recovery by plaintiffs where defendants are not at fault, while also preventing recovery in some situations in which fault likely exists.

The formulation of *res ipsa loquitur* found in the *Restatement Third* reads: “The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.”¹²⁴ Merely glancing at this

121. RESTATEMENT THIRD, *supra* note 10, § 17.

122. *Id.*

123. See, e.g., *id.* § 17 cmt. b.

124. RESTATEMENT THIRD, *supra* note 10, § 17.

formulation, one notes that dramatic changes have been made between the phraseology in the *Restatement Second* and in the *Restatement Third*; the drafters themselves acknowledge this.¹²⁵ Upon further reflection, however, one recognizes that considerable changes have occurred with regard to the substantive content of the doctrine as well.

In what appears to be a repudiation of the formulation of *res ipsa* found in the *Restatement Second*, the drafters of the *Restatement Third* state in the comments accompanying the black letter rule that some courts have erroneously adopted a “two-step” approach according to which *res ipsa* should apply “if the type of accident usually happens because of negligence, and if the negligence, when it occurs, is usually that of the defendant, rather than of some other party.”¹²⁶ Examining this formulation, a careful observer would correctly point out that this is not the formulation of *res ipsa* found in the *Restatement Second*. The second “step,” as described by the drafters of the *Restatement Third*, can clearly be satisfied with an abstract probability whereas subsection (b) in the *Restatement Second* cannot; rather, subsection (b)—at least on its face in the black letter and as it has been applied by the courts—must be satisfied with concrete, case-specific evidence.¹²⁷ By erroneously interpreting and rephrasing the formulation of *res ipsa* in the *Restatement Second*, the drafters of the *Restatement Third* have effectively attacked a straw man. Moreover, they reject the formulation in the *Restatement Second* for several erroneous reasons.

A. *The Problem with the Restatement Third*

The problem with the formulation of *res ipsa loquitur* in the *Restatement Third* is that the drafters have transformed the doctrine from one that requires at least some showing of case-specific evidence into one that, if applied literally, can be completely satisfied by way of non-specific, *ex ante*, abstract probabilities. What the drafters of the *Restatement Second* unfortunately intimated here and there in the comments¹²⁸ (contrary to the overall thrust of those comments and the practice of the courts),¹²⁹ the drafters of the *Restatement Third* have done in the actual black letter formulation of *res ipsa*. By placing the word “ordinarily” at the beginning of the

125. *Id.* at cmt. b (rejecting the so-called “two-step formulation”).

126. *Id.*

127. See *supra* note 117 & accompanying text. As discussed, although there are points in the comments where the drafters of the *Restatement Second* seem to suggest that subsection (b) can be satisfied with abstract, probabilistic evidence, this is contrary to the blackletter of subsection (b) and the overall thrust of the comments. *Id.*

128. RESTATEMENT SECOND, *supra* note 13, § 328D cmt. f.

129. See *supra* note 126.

rule and collapsing all of the probabilities into one, the drafters have taken abstract probabilistic reasoning to a new level. No longer is *any* concrete, case-specific evidence required indicating that negligence was the cause of the injury or even that, if there was negligent causation, the defendant was the responsible party. Rather, if an injury ordinarily occurs because of negligence and that negligence usually is committed by a certain type of person, then such a person is at risk of being held liable under the *Restatement Third*, even if she had absolutely no connection to the plaintiff's injury.¹³⁰ This, indeed, is the primary shortcoming of the formulation of *res ipsa* found in the *Restatement Third*. Although *res ipsa* was created for the purpose of serving injured plaintiffs who have little to no information about how their injury occurred,¹³¹ traditionally the doctrine has *always* required a showing of some sort of case-specific evidence that suggests negligence was the cause and/or which points to a particular defendant.¹³² According to the formulation of *res ipsa* found in the *Restatement Third*, however, no longer is this the case. Indeed, this new formulation suggests that recovery will be possible through the mere presentation of naked statistics.

B. Why the Change?

According to the comments accompanying the *Restatement Third*, the drafters' primary reason for rejecting the so-called two-step formulation lies in their belief that *res ipsa* would be applied most effectively, efficiently, and with the smallest likelihood of error by reducing the number of probabilities in play within the doctrine.¹³³ The drafters' attempt at creating a simplified formulation of *res ipsa*, however, is fundamentally flawed due to (1) their reliance on a flawed understanding of what constitutes a "preponderance of the evidence"¹³⁴ and (2) their related misunderstanding of the nature of proof.¹³⁵

130. See RESTATEMENT THIRD, *supra* note 10, § 17 cmt. b.

131. DOBBS, *supra* note 1, § 154, at 370.

132. *Id.* at 370–71. Dobbs correctly notes that under the doctrine of *res ipsa loquitur*, the jury is permitted to infer that the defendant was negligent in some unspecified way when, *on the evidence adduced*, experience indicates (1) that the injury was probably the result of negligence, even though the exact nature of that negligence is unknown, and (2) that it was probably the defendant who was the negligent person [emphasis added].

Id. Although he uses the language of "probability," Dobbs also makes clear that some sort of case-specific evidence relevant to these two issues must be adduced by the plaintiff. *Id.*

133. RESTATEMENT THIRD, *supra* note 10, § 17 cmt. b.

134. *Id.* (equating the preponderance of the evidence standard with a greater-than-fifty percent probability).

135. *Id.* (misunderstanding that each element of a claim need only be proven *individually* by a preponderance of the evidence for the claim to succeed; the likelihood of each element need not be multiplied together to see if the ultimate product also reaches some requisite statistical probability).

First, throughout the entirety of the accompanying comments, the drafters clearly adopt the erroneous assumption that the preponderance of the evidence standard is merely a greater than fifty percent probability. They repeatedly state that *res ipsa* should be applied whenever the abstract probability of the defendant's negligent causation of the plaintiff's injury is greater than fifty percent and, conversely, should not be applied when that probability is fifty percent or less.¹³⁶ Although dubious in and of itself, this assumption leads them to the conclusion that, because *res ipsa* under the two-step approach consists of *two* statistical probabilities, one should follow mathematical probability theory and multiply those two probabilities together in order to uncover the probability that *both* of those elements were satisfied on the occasion at issue.¹³⁷ For example, the drafters suggest that there might be a greater than fifty percent probability that negligence was the cause of the accident (say a two-thirds likelihood) and there might be a greater than fifty percent probability that the defendant was the negligent party (again, say a two-thirds likelihood), but when those two probabilities are multiplied together, the probability that both of the elements were satisfied is less than fifty percent (here it would be four-ninths).¹³⁸ Hence, according to the drafters, such a situation would not satisfy the preponderance of the evidence standard and *res ipsa* should not apply.¹³⁹ Yet, they point out that under the usual implementation of the two-step approach to *res ipsa*, the probabilities are not multiplied together, thereby allowing an erroneous inference of negligent causation by the defendant.¹⁴⁰

To avoid such erroneous inferences, the drafters of the *Restatement Third* decided to simply reduce the number of probabilities from two to one.¹⁴¹ In comment *b*, they state that the two-step formulation is "unhelpful" insofar as a "one-step inquiry will often be sufficient."¹⁴² They offer a hypothetical situation in which a plaintiff has been injured and five possible causal explanations for the injury exist, only two of which include negligence *by the defendant*. See the chart below. In order to satisfy the first "step" of the two-step formulation—whether the injury is ordinarily caused by negligence—the drafters argue that the trier of fact would have to in-

Moreover, even under mathematical probability theory, the probability that both A and B are true is equal to the product of the probability of each by itself being true only if A and B are probabilistically independent events. Generally, this will not be true in the *res ipsa* context.

136. See, e.g., RESTATEMENT THIRD, *supra* note 10, § 17 cmt. b.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

quire into whether negligence was the cause of the injury in at least one of the other three scenarios as well, before proceeding to the second step. Then, if negligence was “probably” the cause of the injury (meaning three of the five causal stories involved negligence), the trier of fact would move to Step 2, focusing only on the possible causal explanations involving negligence and asking whether the majority of those causal stories involved causal negligence by the defendant.¹⁴³ But, the drafters state, this extended inquiry is unnecessary because, under the single-step, *Restatement Third* approach, the trier of fact already knows that the injury is *not* caused by persons like the defendant sixty percent of the time; hence, *res ipsa* should not apply.¹⁴⁴

| | Element | Cause 1 | Cause 2 | Cause 3 | Cause 4 | Cause 5 |
|--------|-------------------------|---------|---------|---------|---------|---------|
| Step 1 | Negligence? | Yes | Yes | ? | ? | ? |
| Step 2 | Defendant's Negligence? | Yes | Yes | No | No | No |

The drafters’ fear that recovery might be improperly allowed where multiple probabilities are individually greater than fifty percent but less than fifty percent when multiplied together demonstrates a lack of understanding of the nature of proof. Under ordinary rules of proof, one need not prove every element in a case to an extremely high degree of certainty in order to prevail on the merits of the case. But this is exactly what would be required under the drafters’ approach. To illustrate, assume that a cause of action consists of five elements. Further assume that the plaintiff has offered evidence convincing the jury that there is roughly an eighty-five percent chance that each of those elements has been satisfied. (In other words, an eighty-five percent chance that element one was satisfied, an eighty-five percent chance that element two was satisfied, and so on.) Clearly, the plaintiff has proven her case.¹⁴⁵ Under the drafters’ logic, however, multiplying these probabilities together results in only a forty-four percent probability that all of those elements were satisfied on the given occasion and,

143. *Id.*

144. *Id.*

145. COHEN, *supra* note 73, at 58–67, 116–120.

hence, the plaintiff cannot recover.¹⁴⁶ This result demonstrates, once again, why equating evidentiary standards with raw probabilistic numerical values will lead to erroneous results. As Jonathan Cohen long ago demonstrated, proof is not a matter of mathematically combining abstract statistical probabilities, but rather a matter of inducing *belief* about what actually occurred on a particular occasion based on case-specific evidence instantiating or proving the lack of instantiation of competing stories of what actually occurred on that occasion.¹⁴⁷

The drafters' argument that the so-called two-step approach is inefficient compared to their one-step approach also is fallacious. Rather than treat the questions of negligence and the identity of the probably negligent party as two separate issues, they claim, the trier of fact should look at every possible causal explanation that offers an answer to both of these questions, effectively reducing the two probabilities down to one.¹⁴⁸ If in more than half of those causal explanations the defendant is the negligent cause of the injury, then *res ipsa* should apply; conversely, if in less than half of those causal explanations the defendant is not the negligent cause of the injury, *res ipsa* should not apply.¹⁴⁹

The problem with the drafters' reasoning lies in their assertion that collapsing the two probabilities into one is more efficient; indeed, this is extremely doubtful. Assume, for the sake of argument, that there are three possible causal explanations for how the injury occurred: A, B, and C. Assume further that there are three possible defendants who might have caused the injury: X, Y, and Z. See the chart below. Under the so-called two-step approach, there would be two separate issues: (1) which causal explanation was most likely and (2) the identity of the proper defendant. The drafters of the *Restatement Third* argue that these two issues can be collapsed into one. The problem with this argument, however, is that, assuming these two probabilities are independent probabilities, by collapsing the two probabilities into one, one must multiply the number of possible

146. See Jonathan Cohen's comments on this paradox that results from a mathematical probability analysis. *Id.* at 58–61. See also Richard W. Wright, *Possible Wrongs*, *supra* note 39, at n.155 & accompanying text, wherein the author correctly reasons that:

The issues addressed by the two conditions in the *Restatement Second* formulation . . . are distinct liability requirements. As with the distinct elements that make up a complete cause of action, courts should and do require that they be individually appraised and proved by a preponderance of the evidence. They are not subject to the combinatorial algorithms of mathematical probability theory, which are valid for *ex ante* statistical probability assessments of what might happen but not for *ex post* case-specific assessments of what actually happened.

Id.

147. COHEN, *supra* note 73, at 49–120; see also Wright, *Bramble Bush*, *supra* note 43, at 1049–66.

148. RESTATEMENT THIRD, *supra* note 10, § 17 cmt. b.

149. *Id.*

causal explanations by the number of possible defendants. Under the two-step approach, the trier of fact could consider (1) how the injury occurred and (2) the identity of the defendant as two separate probabilities with three possible solutions for each issue:

| Prob 1: How the Injury Occurred | | | | Prob 2: Identity of Defendant | | | |
|---------------------------------|---|---|---|-------------------------------|---|---|---|
| Possible Answers: | A | B | C | Possible Answers: | X | Y | Z |
| % of Likelihood: | ? | ? | ? | % of Likelihood: | ? | ? | ? |

Under the approach of the *Restatement Third*, however, where the two issues are supposedly collapsed into one, the trier of fact would be forced to consider *nine* possible causal explanations for (the still two-part issue of) how the injury occurred and who caused it.

| Single Probability: How the Injury Occurred and Who Caused It | | | | | | | | | |
|---|----|----|----|----|----|----|----|----|----|
| Possible Answers: | AX | AY | AZ | BX | BY | BZ | CX | CY | CZ |

When considering the approach of the *Restatement Third* in this light, the contention that collapsing the two probabilities into one would be more efficient seems dubious at best. Instead of simplifying the process for the trier of fact, she would now have to consider nine separate possible causal explanations for the injury. Although one might argue in response that the two probabilities in the two-step approach might not be independent probabilities such that, for example, X could only cause the injury by way of A or B but not C, the fact remains that the number of possible solutions that the trier of fact must consider under the approach of the *Restatement Third* is still greatly increased when the two probabilities are collapsed into one. Moreover, although the drafters of the *Restatement Third* suggest that they have eliminated the needless second element (subsection (b)) found in the formulation of *res ipsa* located in the *Restatement Second*, the drafters ultimately correctly note in accompanying comment *d* that the plaintiff may be able to establish liability even when the one-step approach statistical probability is not greater than 50 percent by introducing evidence “tending to negate the presence of causes other than the defendant’s negligence.”

The drafters of the *Restatement Third* also contend that the two-step approach is inefficient because, under that approach, even if the trier of fact *knows* that a sixty percent probability exists that the defendant did not cause the injury (issue number two above), such that the second step cannot be satisfied, the trier of fact must still inquire into other explanations of the injury in order to determine whether the injury “ordinarily happens because of negligence” (issue number one above).¹⁵⁰ In other words, the argument is that the two-step inquiry must be performed one step at a time and in the proper sequence; this, the drafters argue, is an inefficient use of time.¹⁵¹ This argument is clearly erroneous, however. If the trier of fact *knows* that one of the elements of a tort absolutely cannot be satisfied, then no further inquiry as to whether the other elements have been satisfied is necessary. Rather, the plaintiff has failed to prove her case. Period.

CONCLUSION

To sum up, the comments accompanying the *Restatement Third*'s formulation of *res ipsa loquitur* simply do not provide good reasons for the significant changes that were made to the wording of the doctrine. Moreover, they demonstrate a confused understanding of the nature of proof and fail to appreciate the consequences that would result if the *Restatement Third*'s formulation were literally applied.

Because of its ambiguous nature and unique role in the law of torts, the doctrine of *res ipsa loquitur* has confused courts in the past and will likely continue to do so. As has been discussed herein, it is imperative that *res ipsa loquitur* be phrased broadly enough to ensure that it continues to serve the policy-driven purposes for which it exists. However, there is a concomitant need that limiting instructions be phrased with the utmost care in order to prevent *res ipsa* from being misused to impose liability on defendants based upon nothing but naked statistics. The drafters of *res ipsa* in the *Restatement Third* have clearly failed in this latter respect. Although not perfect, *res ipsa* in the *Restatement Second*, on its face, effectively balanced the concern for injured plaintiffs with the requirement that some sort of concrete, case-specific evidence point to the defendant. By doing so, it enabled the doctrine of *res ipsa loquitur* to accomplish the important role it was intended to play in the law of torts. Instead of sticking with a formula-

150. *Id.* (stating that the inquiry as to whether something does not ordinarily occur in the absence of negligence is unnecessary when one already knows that the defendant “probably” did not cause the injury, but arguing that the so-called two-step formulation is inefficient as it would require the trier of fact to complete the former inquiry before beginning the latter).

151. *Id.*

tion that worked, the drafters of the *Restatement Third* have created a version of *res ipsa* that is unworkable, highly confusing, premised upon dubious assumptions, and will likely (and hopefully) gain little acceptance by the courts.

